

2006-033990

Recording Requested By:

Wetland Creations, Inc.

When Recorded, Mail To:

Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, California 94612

Accom # 06-03-033

CHICAGO TITLE INSURANCE COMPANY
08:00am 03/09/06 DR Fee: 55.00
Count of pages 17
Recorded in Official Records
County of San Mateo
Warren Slocum
Assessor-County Clerk-Recorder

MAR 23 2006

QUALITY CONTROL BOARD



**COVENANT AND ENVIRONMENTAL RESTRICTION
ON PROPERTY**

Shearwater (Offshore Property), Oyster Point Boulevard, South San Francisco

This Covenant and Environmental Restriction on Property (this "Covenant") is made as of the 12th day of MAY, 2005 by Wetland Creations, Inc. ("Covenantor") who is the Owner of record of that certain property situated in the City of South San Francisco, County of San Mateo, State of California, which is more particularly described in Exhibit A attached hereto and incorporated herein by this reference (such property hereinafter referred to as the "Burdened Property"), for the benefit of the California Regional Water Quality Control Board for the San Francisco Bay Region (the "Board"), with reference to the following facts:

A. The Burdened Property contains hazardous materials.

B. The Burdened Property is located entirely within the San Francisco Bay, and includes a former launch basin (or "slot") which is approximately seven (7) acres in size. The Burdened Property adjoins a site which was, at one time, used for shipbuilding and later used for steel and pipe fabrication. Industrial waste from the adjoining site (principally, total lead, Aroclor 1254, polynuclear aromatics, total petroleum hydrocarbons, mercury, selenium and zinc) have impacted offshore sediment in both the slot and formerly dredged channel located on the Burdened Property. In some instances the impacted sediments have been determined to constitute hazardous material as defined herein. Investigation of the Burdened Property has revealed that, before the implementation of corrective measures, sediment from the vicinity of the storm water discharge pipe was toxic to marine life and sediment within the former dredged channel may have been toxic to marine life in certain areas.

C. The Burdened Property has been the subject of investigation prior to Covenantor's acquisition of the property in conjunction with RWQCB to determine the nature and extent of industrial waste located on the Burdened Property and whether the wastes identified present any significant existing or future potential hazard to ecological systems or public health or safety.

RWQCB is the authorized government agency with jurisdiction over (i) the approval and enforcement of this covenant, (ii) the adoption of clean-up requirements for the property and (iii) acceptance and notification of satisfactory completion of the clean-up requirements of the Burdened Property.

D. Covenantor has cooperated with RWQCB and Former Owners to allow certain corrective measures to be taken to the satisfaction of RWQCB, and RWQCB has since determined, based on information available to it, that the Burdened Property does not present any significant existing or future potential hazard to ecological systems or public health or safety provided that the engineered sediment cap in the slot and the offshore dredged area is maintained and the natural sediment cap is not significantly disturbed in a manner that exposes the underlying contaminated sediments and poses an unacceptable risk to the environment; and, further provided, that certain land use restrictions are observed.

E. A post-dredge survey illustrating the area that was dredged and the area where the engineered sediment cap was placed and the area where the natural sediment cap is located is attached hereto as Exhibit "B" and is fully incorporated herein by this reference. The purpose of the survey is to provide guidance for locating the areas where the engineered sediment cap and the natural sediment cap should be left undisturbed.

F. Full and voluntary disclosure to the Board of the presence of hazardous materials on the Burdened Property has been made and extensive sampling of the Burdened Property has been conducted.

G. Covenantor desires and intends that in order to benefit the Board, and to protect the present and future public health and safety, the Burdened Property shall be used in such a manner as to avoid potential harm to persons or property that may result from hazardous materials that may have been deposited on portions of the Burdened Property.

ARTICLE I GENERAL PROVISIONS

1.1 Provisions to Run with the Land. This Covenant sets forth protective provisions, covenants, conditions and restrictions (collectively referred to as "Restrictions") upon and subject to which the Burdened Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. The restrictions set forth in Article III are reasonably necessary to protect present and future human health and safety or the environment as a result of the presence on the land of hazardous materials. Each and all of the Restrictions shall run with the land, and pass with each and every portion of the Burdened Property, and shall apply to, inure to the benefit of, and bind the respective successors in interest thereof, for the benefit of the Board and all Owners and Occupants. Each and all of the Restrictions are imposed upon the entire Burdened Property unless expressly stated as applicable to a specific portion of the Burdened Property. Each and all of the Restrictions run with the land pursuant to section 1471 of the Civil Code. Each and all of the Restrictions are enforceable by the Board.

1.2 Concurrence of Owners and Lessees Presumed. All purchasers, lessees, or possessors of any portion of the Burdened Property shall be deemed by their purchase, leasing, or possession of such Burdened Property, to be in accord with the foregoing and to agree for and among themselves, their heirs, successors, and assignees, and the agents, employees, and lessees of such owners, heirs, successors, and assignees, that the Restrictions as herein established must be adhered to for the benefit of the Board and the Owners and Occupants of the Burdened Property and that the interest of the Owners and Occupants of the Burdened Property shall be subject to the Restrictions contained herein.

1.3 Incorporation into Deeds and Leases. Covenantor desires and covenants that the Restrictions set out herein shall be incorporated in and attached to each and all deeds and leases of any portion of the Burdened Property. Recordation of this Covenant shall be deemed binding on all successors, assigns, and lessees, regardless of whether a copy of this Covenant and Agreement has been attached to or incorporated into any given deed or lease.

1.4 Purpose. It is the purpose of this instrument to convey to the Board real property rights, which will run with the land, to facilitate the remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to residual hazardous materials.

ARTICLE II DEFINITIONS

2.1 Board or RWQCB. "Board" or "RWQCB" shall mean the California Regional Water Quality Control Board for the San Francisco Bay Region and shall include its successor agencies, if any.

2.2 Improvements. "Improvements" shall mean all buildings, roads, driveways, regradings, and paved parking areas, constructed or placed upon any portion of the Burdened Property.

2.3 Occupants. "Occupants" shall mean Owners and those persons entitled by ownership, leasehold, or other legal relationship to the exclusive right to use and/or occupy all or any portion of the Burdened Property.

2.4 Owner or Owners. "Owner" or "Owners" shall mean the Covenantor and/or its successors in interest, who hold title to all or any portion of the Burdened Property.

2.5 Excavation. "Excavation" or "Dredging" shall mean the excavation of earth or sediment removal from the Burdened Property whether from the bay floor or from within the slot.

2.6 Former Owner. "Former Owner" shall mean any person or entity who held fee title to all or any portion of the Burdened Property at any time prior to January 1, 1997.

2.7 Hazardous Material. A material shall be deemed "Hazardous Material " if it would be

classified as "hazardous" pursuant to the criteria set forth in Section 25260 of the California Health and Safety Code.

2.8 Burdened Property. The "Burdened Property" consists of submerged land and a former launch basin (or "slot") totaling approximately 98 acres which is more particularly described on Exhibit "A" attached hereto and fully incorporated by this reference.

ARTICLE III DEVELOPMENT, USE AND CONVEYANCE OF THE BURDENED PROPERTY

3.1 Restrictions on Development and Use. Covenantor promises to restrict the use of the Burdened Property as follows:

3.1.1 The Owner or occupant of said Burdened Property shall not make commercial or development use of the Burdened Property in any manner inconsistent with the provisions of this Article.

3.1.2 In the event any Dredging, earth movement or Excavation is proposed by Owner to occur upon the Burdened Property, or any portion thereof, the Owner of said Burdened Property shall:

A. Notify RWQCB of such proposed Dredging, earth movement or Excavation and obtain written approval prior to the beginning of such Dredging, earth movement or Excavation.

B. Direct any contractor or subcontractor engaged in such Dredging, earth movement or Excavation activities to comply with all applicable requirements of law and the directives of lawful authorities and applicable requirements of this Covenant and the lawful directives of RWQCB.

C. Utilize reasonable procedures to avoid disturbing either the engineered or natural sediment caps in the slot and the offshore dredged area, which isolate the underlying contaminated sediments.

3.1.3 No marina or other anchorage or docking facility shall be installed or erected on the Burdened Property.

3.1.4 The Burdened Property and any portion thereof, may be used for maintenance or monitoring of corrective action, remediation and restoration activities approved by the RWQCB.

3.1.5 All uses and development of the Burdened Property shall be consistent with any applicable Board Order or Risk Management Plan, each of which is hereby incorporated by reference including future amendments thereto. All uses and development shall preserve the integrity of any cap, any remedial measures taken or remedial equipment installed, and any groundwater monitoring system installed on the Burdened Property pursuant to the requirements of the Board, unless otherwise expressly permitted in writing by the Board.

3.1.6 No Owners or Occupants of the Burdened Property or any portion thereof shall drill, bore, otherwise construct, or use a well for the purpose of extracting water for any use, including but not limited to, domestic, potable, or industrial uses, unless expressly permitted in writing by the Board.

3.1.76 The Owner shall notify the Board of each of the following: (1) The type, cause, location and date of any disturbance to any cap, any remedial measures taken or remedial equipment installed, and of the groundwater monitoring system installed on the Burdened Property pursuant to the requirements of the Board, which could affect the ability of such cap or remedial measures, remedial equipment, or monitoring system to perform their respective functions and (2) the type and date of repair of such disturbance. Notification to the Board shall be made by registered mail within ten (10) working days of both the discovery of such disturbance and the completion of repairs.

3.1.87 The Covenantor agrees that the Board, and/or any persons acting pursuant to Board orders, shall have reasonable access to the Burdened Property for the purposes of inspection, surveillance, maintenance, or monitoring, as provided for in Division 7 of the Water Code.

3.1.98 No Owner or Occupant of the Burdened Property shall act in any manner that will aggravate or contribute to the existing environmental conditions of the Burdened Property. All use and development of the Burdened Property shall preserve the integrity of any capped areas.

3.2 Notice in Agreements. After the date of recordation hereof, all Owners and Occupants shall execute a written instrument which shall accompany all purchase agreements or leases relating to the property. Any such instrument shall contain the following statement:

The land described herein contains hazardous materials in sediments on the property, and is subject to a deed restriction dated as of _____, 200_, and recorded on _____, 200_, in the Official Records of _____ County, California, as Document No. _____, which Covenant and Restriction imposes certain covenants, conditions, and restrictions on usage of the property described herein. This statement is not a declaration that a hazard exists.

3.3 Enforcement.

3.3.1 Failure of an Owner or Occupant to comply with any of the restrictions, as set forth in paragraph 3.1, shall be grounds for the Board, by reason of this Covenant, to have the authority to require that the Owner modify or remove any Improvements constructed in violation of that paragraph and discontinue the offending use of the Burdened Property in violation of Paragraph 3.1. Violation of the Covenant shall be grounds for the Board to file civil actions against the Owner as provided by law and pursue any remedy provided by law to enforce the provisions of Paragraph 3.1. Any costs reasonably and necessarily incurred by RWQCB to enforce the provisions of Paragraph 3.1 shall be recoverable from the Owner or the Occupant of the Burdened Property determined in the final disposition of the enforcement action to have failed to observe the Restrictions.

3.3.2 For purposes of Health and Safety Code Section 25358.9, the remedial action recited in Paragraph D, above, was approved by the RWQCB and the RWQCB determined that the remedial action complied with all laws, rules, regulations, standards, and requirements, criteria or limitations applicable to the construction, operation and closure of the type of facility at the Burdened Property.

3.3.32 Neither Covenantor, Owners or Former Owners shall have any obligation to enforce or to police the observance of the Restrictions set forth herein by other Owners or Occupants of the Burdened Property or any portion thereof. This Covenant shall not create any private right of action against Covenantor, its successors or Former Owners, or any other Owner or Occupant of the Burdened Property or any portion thereof.

3.3.43 Within thirty (30) days after receipt of a written request from any Owner or Occupant of the Burdened Property or any portion thereof, RWQCB shall provide to such Owner or Occupant a written statement, substantially in the form attached hereto as Exhibit C, indicating whether to RWQCB's knowledge such Owner or Occupant is operating in compliance with the provisions of this Covenant, and such confirmation shall be conclusive as of the date prepared. If any Owner or Occupant fails to receive such confirmation within said 30-day period, any interested party may conclusively presume at that time that RWQCB has no knowledge of any failure of Owner or Occupant to comply with the Restrictions imposed by this Covenant. This shall not preclude RWQCB from determining at a subsequent time that there has been a failure to comply with such Restrictions.

ARTICLE IV VARIANCE AND TERMINATION

4.1 Variance. Any Owner or, with the Owner's consent, any Occupant of the Burdened Property or any portion thereof may apply to the Board for a written variance from the provisions of this Covenant.

4.2 Termination. Any Owner or, with the Owner's consent, any Occupant of the Burdened Property or a portion thereof may apply to the Board for a termination of the Restrictions as they apply to all or any portion of the Burdened Property.

4.3 Term. Unless terminated in accordance with paragraph 4.2 above, by law or otherwise, this Covenant shall continue in effect in perpetuity.

4.4 Amendment. This Covenant may be amended from time to time in a writing signed by the authorized representative of RWQCB, or his or her designee, and all of the then Owners of the Burdened Property, or any portion thereof which remains subject to the Covenant. Any such amendment shall be effective only upon the date any such amendment is filed for recording in the official records of the County of San Mateo, State of California. Unless this covenant is terminated in accord with Section 4.2 hereof (as it applies to all or any portion of the Burdened Property) no variance or amendment hereto shall alter the provisions set forth in Sections 1.1 - 1.4 or Articles II and III. Unless this covenant is terminated in accord with Section 4.2 hereof (as it applies to all or any portion of the Burdened Property) no variance or amendment hereto shall alter the provision set forth in Section 3.3.2.

4.5 RWQCB Costs. Any applicant seeking a variance or termination of this covenant shall pay the RWQCB all reasonable costs incurred by the RWQCB in processing the application.

ARTICLE V MISCELLANEOUS

5.1 No Dedication Intended. Nothing set forth herein shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Burdened Property or any portion thereof to the general public.

5.2 Notices. Whenever any person gives or serves any notice, demand, or other communication with respect to this Covenant, each such notice, demand, or other communication shall be in writing and shall be deemed effective (1) when delivered, if personally delivered to the person being served or official of a government agency being served, or (2) three (3) business

days after deposit in the mail if mailed by United States mail, postage paid certified, return receipt requested:

If To: "Covenantor"
Wetland Creations, Inc.
c/o George A. Morris
P.O. Box 10638
Eugene, Oregon 97440

If To: "Board"
Regional Water Quality Control Board
San Francisco Bay Region
Attention: Executive Officer
1515 Clay Street, Suite 1400
Oakland, California 94612

5.3 Partial Invalidity. If any portion of the Restrictions or terms set forth herein is determined to be invalid for any reason, the remaining portion shall remain in full force and effect as if such portion had not been included herein.

5.4 Article Headings. Headings at the beginning of each numbered article of this Covenant are solely for the convenience of the parties and are not a part of the Covenant.

5.5 Recordation. This instrument shall be executed by the Covenantor and by the Executive Officer of the Board. This instrument shall be recorded by the Covenantor in the County of San Mateo within ten (10) days of the date of execution.

5.6 References. All references to Code sections include successor provisions.

5.7 Construction. Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the Covenant to effect the purpose of this instrument and the policy and purpose of the Water Code. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

IN WITNESS WHEREOF, the parties execute this Covenant as of the date set forth above.

Covenantor: Wetland Creations, Inc.

By: 

Title: SECRETARY

Date: 5-12-05

Agency:

State of California
Regional Water Quality Board,
San Francisco Bay Region

By: 

Title: Executive Officer

Date: 9-6-05

Bruce H. Wolfe

OREGON
STATE OF ~~CALIFORNIA~~)
)
COUNTY OF Lane)

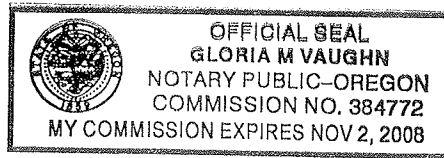
✓ Gloria M. Vaughn, Notary Public

On May 12, 2005 before me, the undersigned a Notary Public in and for said state, personally appeared [Covenantor], personally known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument.

WITNESS my hand and official seal.

Gloria M. Vaughn

Notary Public in and for said
County and State



STATE OF CALIFORNIA)
)
COUNTY OF _____)

On _____, 20__ before me, the undersigned a Notary Public in and for said state, personally appeared [EXECUTIVE OFFICER], personally known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument.

WITNESS my hand and official seal.

Notary Public in and for said
County and State

ILLEGIBLE NOTARY SEAL DECLARATION

(GOVERNMENT CODE 27361.7)

I declare under penalty of perjury that the notary seal on the document
to which this statement is attached, reads as follows:

NAME OF NOTARY PUBLIC: Gloria M Vaughn

COMMISSION NUMBER: 304 772

NOTARY PUBLIC STATE: Oregon

COUNTY: Lane

MY COMM. EXPIRES: Nov 2, 2008
(DATE)

SIGNATURE OF DECLARANT: Terina Kung

PRINT NAME OF DECLARANT: Terina Kung

CITY & STATE OF EXECUTION: SF, CA

DATE SIGNED: 3-3-06

THE ABOVE INFORMATION MUST BE LEGIBLE FOR SCANNING

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Alameda

SS.

On 9/6/2005

Date

, before me,

Howard Leong, Notary Public

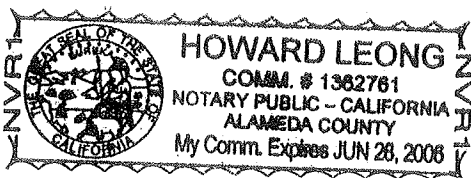
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared

BRUCE H WOLFE

Name(s) of Signer(s)

- ☐ personally known to me
☒ proved to me on the basis of satisfactory evidence



to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

[Signature]

Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: COVENANT AND ENVIRON RESTRICTION

Document Date: _____ Number of Pages: _____

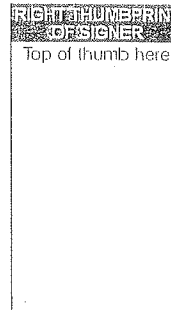
Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____



ILLEGIBLE NOTARY SEAL DECLARATION

(GOVERNMENT CODE 27361.7)

I declare under penalty of perjury that the notary seal on the document
to which this statement is attached, reads as follows:

NAME OF NOTARY PUBLIC: Howard Leong

COMMISSION NUMBER: 1262761

NOTARY PUBLIC STATE: California

COUNTY: Alameda

MY COMM. EXPIRES: Jan 28, 2006
(DATE)

SIGNATURE OF DECLARANT: Terina Kung

PRINT NAME OF DECLARANT: Terina Kung

CITY & STATE OF EXECUTION: SF, CA

DATE SIGNED: 3-7-06

THE ABOVE INFORMATION MUST BE LEGIBLE FOR SCANNING

EXHIBIT A

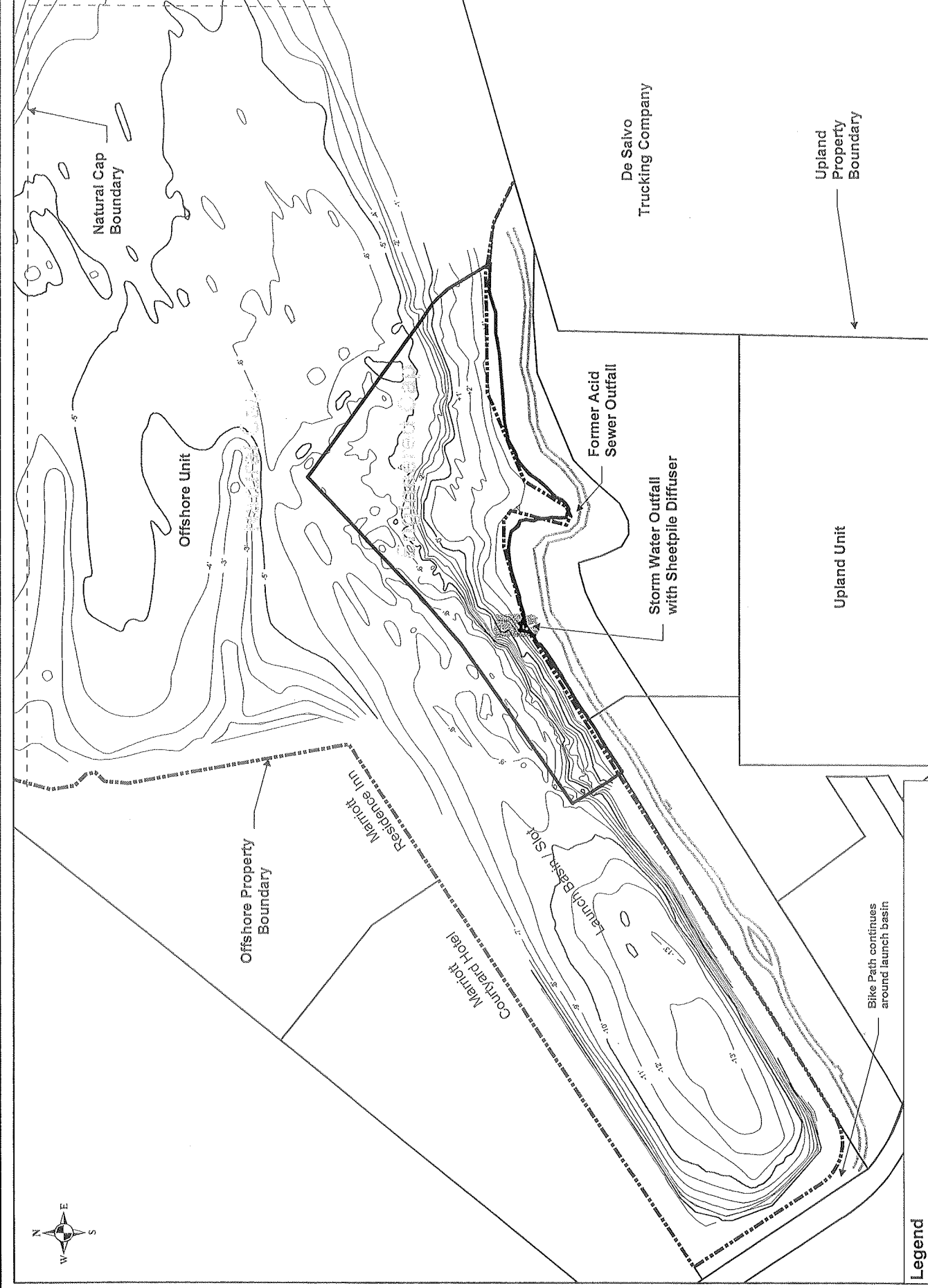
LEGAL DESCRIPTION OF BURDENED PROPERTY

Burdened Property Description

The Remainder Parcel consisting of 98.18 acres more or less as platted and recorded in Parcel Map No. 97-027, recorded January 22, 1998, in Book 70 of Parcel Maps at pages 33-40, File No.98-008274, Official Records of San Mateo County.

EXHIBIT B

A “post-dredge survey” illustrating dredged area and locations of the engineered and natural sediment caps.



Legend

-  Limits of Dredge Area and Engineered Cap
-  Offshore Property Boundary
-  Bike Path
-  Natural Cap Boundary

Note: Contours are 1 foot intervals Mean Lower Low Water (MLLW) datum.
Offshore topography based on a December 2001 bathymetric survey.



EXHIBIT C

Date_____

Dear _____:

This is to notify (Burdened Property Owner/Occupant] in response to a request dated _____ made pursuant to that certain Declaration and Covenant affecting Use of Burdened Property dated _____ (the Covenant) and recorded _____,20__, in the Official Records of San Mateo County State of California, at Page _____ of Book_____, that the Regional Water Quality Control Board has no knowledge of any failure of [Burdened Property Owner/Occupant] to comply with the Restrictions imposed by the Covenant [or RWQCB has knowledge of the following facts:_____.] This determination is made on the basis of a review of its official records and the Board has made no other inquiries and has made no inspection of the property owned by [Burdened Property Owner/Occupant].

REGIONAL WATER QUALITY CONTROL BOARD

By_____